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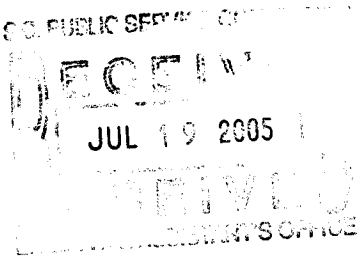
BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2005-180-E, 2003-254-E



IN RE:

South Carolina Electric & Gas Company,)
)
Complainant/Petitioner,)
)
vs) **ANSWER AND COUNTERCLAIM**
)
Aiken Electric Cooperative, Inc.,)
)
Defendant/Respondent.)
)

The Defendant/Respondent, Aiken Electrical Cooperative, Inc. ("Aiken Electric"), answers the Complaint herein as follows:

FOR A FIRST DEFENSE

1. Aiken Electric admits the allegations of Paragraph 1 of the "Jurisdiction and Parties" portion of the Complaint, subject to its averment that the Commission does not have jurisdiction to impose upon Aiken Electric the regulatory requirements of Regulation 103-304 in this action.

2. Aiken Electric admits the allegations of Paragraph 2 of the "Jurisdiction and Parties" portion of the Complaint; but denies that Regulation 103-304 is applicable to this matter and further states that there is no basis for the Commission to conduct the requested formal proceeding or investigation, or order a cease and desist as requested as this matter is not ripe for adjudication.

3. Aiken Electric admits the allegations of Paragraph 3 of the "Jurisdiction and Parties" portion of the Complaint that the Commission has jurisdiction of the parties herein, but denies that the Commission has jurisdiction of the subject matter, inasmuch as the subject matter of the Complaint constitutes a request that the Commission amend the law, reduce, limit,

or restrict existing rights by regulation, impair or unduly burden rights of contract, and/or effect a "taking" of property rights or unduly burden the exercise of property rights, all of which is beyond the proper jurisdiction of the Commission.

4. Aiken Electric denies the allegations of Paragraph 4 of the "Facts" portion of the Complaint as the action does not arise under Commission Regulation 103-304, in that it does not apply to Aiken Electric under the facts alleged by South Carolina Electric & Gas ("SCE&G") in the Complaint.

5. Aiken Electric admits so much of the allegations of Paragraph 5 of the "Facts" portion of the Complaint as allege that the Commission assigned the referenced territory to SCE&G, that this assignment is reflected on the referenced Exhibit A, and that a copy of the Map is attached as an exhibit to the Complaint.

6. Aiken Electric admits the allegations of Paragraph 6 of the "Facts" portion of the Complaint.

7. Answering the allegations of Paragraph 7 of the "Facts" portion of the Complaint, Aiken Electric admits that at the time of territorial assignment, Aiken Electric owned a distribution line within SCE&G's territory and that such distribution line entitles it to statutorily serve within the corridor surrounding the distribution line which dates back to the 1950s. Aiken Electric lacks sufficient information upon which to form a belief as to the remaining allegations of Paragraph 7 as Aiken Electric has yet to receive a legible copy of referenced Exhibit B and, therefore, denies the same.

8. Answering the allegations of Paragraph 8 of the "Facts" portion of the Complaint, Aiken Electric admits that it has not sought Commission approval for this line upgrade, and states that such permission is not required or necessary as Aiken Electric has a statutory right to serve. Furthermore, Aiken Electric denies that it engaged in any activity in violation of Regulation 103-304 inasmuch as the regulation may not limit, reduce, or restrict rights granted by law, impair or unduly burden contract rights, effect a "taking" of property rights or impose an

undue burden upon the exercise of property rights, and states further that the said regulation does not bar it from conducting the activities described in the Complaint. Aiken Electric lacks sufficient information upon which to form a belief as to the remaining allegations of Paragraph 8 as Aiken Electric has yet to receive a legible copy of referenced Exhibit C and, therefore, denies the same.

9. Answering the allegations of Paragraph 9 of the "Facts" portion of the Complaint, Aiken Electric again admits that it has not sought Commission approval for this line upgrade, and states that such permission is not required or necessary as Aiken Electric has a statutory right to serve. Furthermore, Aiken Electric denies that it engaged in any activity in violation of Regulation 103-304 inasmuch as the regulation may not limit, reduce, or restrict rights granted by law, impair or unduly burden contract rights, effect a "taking" of property rights or impose an undue burden upon the exercise of property rights, and states further that the said regulation does not bar it from conducting the activities described in the Complaint. Aiken Electric denies the second sentence of this Paragraph. Aiken Electric admits that this Paragraph quotes a portion of Commission Regulation 103-304, but denies that this citation is "material."

10. Aiken Electric denies that SCE&G is entitled to the relief sought in Paragraph 10 of the portion of the Complaint entitled "Relief."

FOR A SECOND DEFENSE

11. Commission Regulation 103-304 may not operate to limit or restrain Aiken Electric from exercising a right to provide service that is provided by law and, therefore, has no application to this case.

FOR A THIRD DEFENSE

12. SCE&G is estopped from attempting to invoke Commission Regulation 103-304 in this case, in that it has not observed the very requirements which it claims the Defendant is required to observe. Accordingly, Defendant pleads estoppel as an affirmative defense.

FOR A FOURTH DEFENSE

13. Aiken Electric pleads unclean hands as an affirmative defense. Upon information and belief, SCE&G has failed to seek permission under Regulation 103-304 for its own service expansion and has further not complained when other Electric Utilities and Providers failed to do so.

FOR A FIFTH DEFENSE

14. Aiken Electric pleads ratification as an affirmative defense to SCE&G's Regulation 103-304 claims.

FOR A SIXTH DEFENSE

15. Aiken Electric pleads the affirmative defenses of estoppel and collateral estoppel. SCE&G has presented exactly the same line upgrade issue on two prior occasions to the PSC and Circuit Court, both times being denied relief due to the Cooperatives' statutory right to serve. See "**Exhibit A**", Palmetto Electric Commission Orders, Order No. 2003-635; Order No. 2003-731 and "**Exhibit B**", Aiken Electric Sandhills School Orders, Commission Order No. 2002-357; Order No. 2002-423; and Circuit Court Order of the Honorable J. Mark Hayes dated December 22, 2003. Accordingly, the Regulation 103-304 action should be dismissed.

FOR A SEVENTH DEFENSE

16. Aiken Electric pleads ripeness as an affirmative defense due to the Commission and Circuit Court's determination that Regulation 103-304 issues are not ripe for review as the Commission is still in the process of determining the proper scope of Regulation 103-304. See See "**Exhibit A**", Palmetto Electric Commission Orders, Order No. 2003-635; Order No. 2003-731 and "**Exhibit B**", Aiken Electric Sandhills School Orders, Commission Order No. 2002-357; Order No. 2002-423; and Circuit Court Order of the Honorable J. Mark Hayes dated December 22, 2003.

FOR AN EIGHTH DEFENSE

17. The Defendant Aiken Electric has a statutory right to serve customers whose premises lie partially or wholly within Aiken's distribution line corridor.

FOR A NINTH DEFENSE

18. Defendant Aiken Electric pleads failure to state a claim as to the Regulation 103-304 violation. The Commission has routinely ruled that a line upgrade and line "character" issues are irrelevant to corridor status and that Regulation 103-304 is inapplicable where a statutory right to serve applies. As such, this matter should be dismissed in its entirety.

FOR A TENTH DEFENSE

19. SCE&G's Complaint is the latest salvo in an ongoing campaign to persuade the Commission that Commission Regulation 103-304 should be applied to electric cooperatives to limit, reduce, and restrict a variety of legal rights provided to electric cooperatives and others by South Carolina law. It is not appropriate for SCE&G to use the Commission as a vehicle for this effort, and SCE&G's efforts to change the law and impair the legal rights of electric cooperatives and others are directed to the wrong body. If SCE&G wishes to change the law to impose the requirements it advocates in this Complaint – with the attendant far-reaching legal consequences - the proper body to effect this change is the South Carolina General Assembly, not the Commission. The Commission should, therefore, exercise its discretion to decline to conduct the formal hearing or "investigation" requested by SCE&G, and deny the relief sought in the Complaint. Accordingly, Aiken Electric requests its costs and fees pursuant to S.C. Code Ann. §15-36-10 (West Supp. 2005) in responding to this frivolous action as SCE&G is attempting to re-litigate a line upgrade issue that has already been settled by the Commission and the South Carolina Circuit Court.

FOR AN ELEVENTH DEFENSE

20. Aiken Electric pleads improper consolidation and joinder as a defense. Because Aiken Electric's Answer was not due until July 17, 2005, fundamental due process requires that

the Commission not rule on an important procedural motion, such as a Motion to Consolidate, until Aiken has made an appearance and filed an Answer in the underlying action. Otherwise, Aiken Electric has no ability to be heard on the issue. Accordingly, Aiken Electric requests that this matter be stayed pending a hearing on the consolidation issue.

FOR A TWELFTH DEFENSE

21. Aiken Electric pleads waiver as an affirmative defense. Upon information and belief, SCE&G knowingly ignored facility expansion issues under Regulation 103-304 and has allowed Electric Cooperatives such as Aiken Electric and other electric suppliers to invest in facility expansions without complaining and, therefore, has waived any claim it may have.

FOR A THIRTEENTH DEFENSE

22. Aiken Electric pleads laches as an affirmative defense. SCE&G has unreasonably delayed seeking to enforce Regulation 103-304, allowing Aiken Electric to invest significant sums in facilities expansion without raising the issue until after the fact. Furthermore, enforcement of this regulation is not proper as the Commission is still engaged in the process of determining the scope of Regulation 103-304.

FOR A FOURTEENTH DEFENSE
BY WAY OF A FIRST COUNTERCLAIM

23. Upon information and belief, Plaintiff SCE&G has represented to Aiken Electric's customers that Aiken Electric does not have a right to serve the customers within Aiken Electric's Corridor.

24. Such misrepresentations harm Aiken Electric as Aiken Electric's customers are receiving competing and conflicting corridor advice from SCE&G.

25. Aiken Electric requests that the Commission enjoin SCE&G from making such further misrepresentations to Aiken Electric's customers.

WHEREFORE, having answered the Complaint herein, Aiken Electrical Cooperative, Inc., prays that the same be dismissed with prejudice and judgment, costs, and fees be entered

in its favor pursuant to S.C. Code Ann. §15-36-10 and that SCE&G be enjoined from making further service related misrepresentations to Aiken Electric's customers.

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Columbia, South Carolina

July 18, 2005.

EXHIBIT A

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2002-192-E - ORDER NO. 2003-635

OCTOBER 23, 2003

IN RE: South Carolina Electric & Gas Company,	)	ORDER DENYING
	)	AND DISMISSING
Complainant,	)	COMPLAINT
	)	
vs.	)	
	)	
Palmetto Electric Cooperative, Inc.,	)	
	)	
Respondent.	)	

This matter came before the Public Service Commission of South Carolina ("the Commission") on a Complaint filed by South Carolina Electric & Gas Company ("SCE&G") against Palmetto Electric Cooperative, Inc. ("Palmetto" or the "Coop."), seeking a determination that Palmetto was not entitled to provide service to the Walsh facility, and that Walsh was required to take service from SCE&G. A hearing was held on August 12, 2003, in the offices of the Commission, with the Honorable Mignon Clyburn, Chair, presiding. SCE&G was represented by Francis P. Mood, Esquire, Catherine D. Taylor, Esquire, and Dahli Myers, Esquire. Palmetto was represented by Val H. Steiglitz, Esquire and J. David Black, Esquire. The Commission Staff was represented by F. David Butler, General Counsel.

SCE&G presented the direct and rebuttal testimony of Kenneth L. Ackerman, III, and the rebuttal testimony of David Tempel, Jr. Palmetto presented the direct testimony of A. Berl Davis, Jr., Keith DuBose, G. Thomas Upshaw, and John Walsh. The Commission Staff did not present any witnesses in this case. The positions of the parties are summarized below.

This is a case involving corridor rights. SCE&G maintains that the Walsh facility is located in its assigned territory and that it, therefore, has the exclusive right to serve, pursuant to S.C. Code Ann. § 58-27-620 *et seq.* (1976)(the Territorial Assignment Act). SCE&G further maintains that the distribution line giving rise to the corridor upon which Palmetto claims its right to provide service does not appear on the "A-Map" for this area and, therefore, no corridor exists. While SCE&G acknowledges that the "A Map" may be incorrect, it contends that the "A Map" constitutes a "binding agreement" between the parties, such that the Commission is precluded from correcting it even if it is wrong.[1] Finally, SCE&G asserts that Palmetto should be denied the right to serve because it extended service to the Walsh facility without first obtaining Commission approval, which SCE&G contends is required by Reg. 103-304.

Palmetto acknowledges that the distribution line upon which it bases its claim of corridor rights to serve the Walsh facility was left off the "A Map" for this area. Palmetto maintains, however, that "A Maps" carry no binding legal authority, are merely illustrative of where a distribution line may or may not be located, and may (and should)

[1] At the August 12th hearing, however, SCE&G witnesses did indicate that an incorrect "A Map" should be corrected, (Tr. p. 34, lines 3-9; p. 35, lines 5-14), through "proper procedure."

be corrected when determined to be incorrect. Palmetto asserts that the Territorial Assignment Act provides for corridors surrounding distribution lines as they existed as of the date of the Act (July 1, 1969), and not based upon whether the line appears on an "A Map" or not. Since the existence of a corridor gives a customer the right to choose suppliers, Palmetto points out that the net effect of SCE&G's position would be to deprive Walsh – and other similarly situated electric customers – of their statutory right to take service from the provider of their choice, based purely upon a mistake in an "A Map." Palmetto also contends that SCE&G waived any right to deny Palmetto's corridor rights here, or is estopped from doing so, because SCE&G consented to Palmetto providing service to a mini-warehouse facility in 1994, located in the same exact territory which SCE&G now claims is its exclusive territory. In sum, Palmetto asserts that the physical footprint of the Walsh facility building is within the 300-foot corridor of a Palmetto 1965 distribution line that was mistakenly left off the "A Map" and that Palmetto has the right to serve the Walsh facility as one premises pursuant to S.C. Code Ann. § 58-27-620(1)(d)(iii) (1976). With respect to Reg. 103-304, Palmetto contends that this regulation cannot override or restrain the statutory right of a service provider to extend service to meet a customer choice in a corridor, as provided by the Territorial Assignment Act, which does not require Commission notice or approval prior to extending such service.

After careful consideration of the pleadings, the witnesses' testimony (the entirety of the record, not just the transcript citations herein), exhibits, arguments of counsel, and

the applicable law, the Commission finds and concludes that Palmetto is entitled to serve the Walsh facility, for the reasons set forth below.

I. FACTUAL BACKGROUND

In 2002, a representative of the Jasper County Economic Development Commission contacted Palmetto about a new manufacturing facility -- Walsh Fabrication -- that was locating in Jasper County. Palmetto and Walsh then discussed the possibility of Palmetto providing electric service to Walsh. (Tr. p. 185, lines 3-10; p. 157, lines 12-16; p. 158, lines 1-15.) Thomas Upshaw, Chief Executive Officer of Palmetto, directed Palmetto staff to take measurements from a Palmetto distribution line in the vicinity of the Walsh facility to ascertain whether the Walsh facility was within the 300-foot corridor of the line, in order to determine whether Palmetto would be able to serve the premises. Palmetto line service technicians Dan Wood and Keith Dubose walked the property on different occasions and took measurements by hand. Also, Berl Davis, Palmetto's Vice-President for Engineering and Operations, directed Ward Edwards, Inc., an engineering and surveying company, to take measurements using a Global Positioning System ("GPS") device to make sure the Walsh premises was within Palmetto's 300 foot corridor. (Tr. p. 76, lines 3-21; p. 77, line 1; p. 185, lines 11-22; p. 186, lines 1-18; p. 202, lines 13-25; p. 203, lines 1-25; p. 204, lines 1-25; p. 205, lines 1-25; p. 206, lines 1-13).

After taking the GPS measurements two times, Ward Edwards, Inc., prepared a certified plat of the property illustrating the footprint of the Walsh Fabrication facility in relation to the Palmetto distribution line and also illustrating the 300-foot exclusive

corridor extending from that line. The plat was certified by Donald R. Cook, Jr., SCPLS #19010 and appears in the record as Exhibit 2. (The document attached as Exhibit 2 in the transcript was actually introduced at the hearing as Upshaw Exhibit 1. It is referred to as Exhibit 2 in this Order since that is how it is marked in the transcript). According to this exhibit, a portion of the Walsh facility is within the Palmetto 300 foot corridor. (Tr. p. 76, lines 19-20). SCE&G does not contest that the Walsh facility is within 300 feet of the Palmetto line as measured by Palmetto. (Tr. p. 45, lines 19-25; p. 46, lines 1, 13-19).

A. History of Palmetto's Distribution Line.

There is substantial evidence that the distribution line from which Palmetto's corridor was measured has been in place since 1965. (Tr. p. 77, lines 4-12). Palmetto Exhibit 3 shows that Palmetto began serving the home of Addie Graham from this line on November 16, 1965. (Tr. p. 81, lines 8-25; p. 82, lines 1-3). This exhibit, which is Mrs. Graham's cooperative membership card, lists an electric meter bearing serial number: "18-253-860." As late as April, 1994, when Keith Dubose, a Palmetto employee, had reason to check, this same meter was still attached to the Graham house. (Tr. p. 166, lines 1-12). Palmetto introduced several other exhibits substantiating the fact that it had been providing service to Mrs. Graham from this line prior to the enactment of the Territorial Assignment Act. See, Exhibit 6, (Palmetto's service record showing that Mrs. Graham's service was disconnected on August 8, 1994) (Tr. p. 84, lines 4-20); Exhibit 7, (a record showing Mrs. Graham's participation in a Palmetto credit program) (Tr. p. 84, lines 21-25; p. 85, lines 1-11); Exhibit 8, (minutes from the December 13, 1965, Palmetto board meeting approving Addie Graham as a member of the Palmetto Cooperative) (Tr.

p. 85, lines 12-25; p. 86, lines 1-7). SCE&G failed to offer any evidence that the Palmetto distribution line did not commence service to the Addie Graham residence in 1965. Therefore, pursuant to S.C. Code Ann. §58-27-620, Palmetto possesses a corridor right extending 300 feet from each side of the Addie Graham distribution line, as it existed on July 1, 1969.

Palmetto established the original position of the Addie Graham distribution line by reference to a 1965 staking sheet (Exhibit 4) (Tr. p. 82, lines 7-21). The position of this original line is reflected as the green line on Exhibit 2. (Tr. p. 92, lines 4-5). The record contains extended testimony on the staking sheet as reliably establishing the original position of the line, and, thus, the measurement of the corridor. The evidence shows that subsequent to 1965, there have been a few minor adjustments in the position of portions of the original line, both upstream and downstream of the location from which Palmetto provides service to Walsh. However, Palmetto testified that the segment of the line from which its service to Walsh extends, and from which Palmetto measured the 300 foot corridor, has not moved since the line was originally constructed. (Tr. p. 209, lines 12-22; p. 178 lines 1-17, 24-25; p. 179 lines 1-9). Therefore, any movements in the position of the line occurred at points unrelated to the point from which the corridor was measured and have no significance. There was no evidence sufficient to rebut Palmetto's evidence on the original location of the line and, therefore, the location of Palmetto's corridor and Walsh's location within the corridor. It is clear that the Walsh facility is within the corridor.

B. The "A Map" Issue.

A portion of Palmetto's 1965 Addie Graham distribution line was inadvertently and mistakenly omitted from the "A Map." SCE&G contended that it has maintained service in conformity with the "A Map" since it was signed in 1982. However, as noted, Palmetto has been serving the Graham residence since 1965. Palmetto also offered evidence that it has served several trailer homes near Mrs. Graham's house from the same line. See, Exhibit 2. SCE&G has not objected to this service. Additionally, it is undisputed that Palmetto provided service from the Addie Graham line to a mini-warehouse, which is shown on Exhibit 2, since at least 1994. (Tr. p. 77, lines 13-25).

In 1994, SCE&G contacted Palmetto and questioned Palmetto's right to serve the mini-warehouse facility. (Tr. p. 77, lines 20-21; p. 166, lines 1-12). SCE&G took the position that the mini-warehouses were within SCE&G's exclusive assigned territory. Id. Palmetto representative Keith Dubose met SCE&G representative Kenny Ackerman at the site. DuBose showed Ackerman the Addie Graham membership card and the meter on her house. Id. The parties' dispute whether SCE&G thereupon conceded that Palmetto had corridor rights that included the mini-warehouses. DuBose testified that Ackerman acknowledged Palmetto's corridor rights. Ackerman testified he did not. However, it is undisputed that after the meeting between DuBose and Ackerman, SCE&G made no further complaint about Palmetto providing service to the mini-warehouses. Nor is it disputed that Palmetto's service to the mini-warehouses has expanded since it began, growing from two lights to additional lights and a building, all without objection from SCE&G. (Tr. p. 46, lines 20-25; p. 47, lines 1-25; p. 48, lines 1-

25; p. 49, lines 1-9). SCE&G conceded that this service to the mini-warehouses was, in fact, not consistent with the "A Map." (Tr. p. 52, lines 5-14).

In addition to the Addie Graham distribution line being left off the "A Map" at issue here, Palmetto testified that it was aware of at least one other occasion on which an "A Map" had omitted a line. (Tr. p. 114, lines 18-21).

Finally, while SCE&G asserted that the "A Map" constitutes an accurate depiction of lines in the area, both SCE&G's witnesses acknowledged that they had no personal knowledge of the circumstances under which the "A Map" at issue here was created and had no role in preparing it. (Tr. p. 38, lines 18-25; p. 39, lines 1-25; p. 40, line 1; p. 226, lines 19-25).

The "A Maps" are not official documents of the Commission; they were not approved by Order of the Commission as were the individual state county territorial assignment maps; and there was no evidence these "A Maps" were ever filed with the Commission.

C. Palmetto Electric Cooperative's Service to Walsh Fabrication.

After Walsh chose to receive service from Palmetto, Palmetto ran service from a portion of the existing Addie Graham distribution line – from a segment of the line that was in the same location as it was prior to 1969 – to the Walsh facility, via an overhead and underground line.

SCE&G then brought this action, seeking a ruling that this service was improper.

II. LAW AND ANALYSIS

A review of the applicable statutes and case law, as applied to the entire record in this case, shows that Palmetto is entitled to serve the Walsh facility.

A. The 1969 Territorial Assignment Act Confers Corridor Rights Based Upon Lines As They Exist At The Time Of The Act – Not As They Are Shown On Later Maps.

SCE&G's position on the "A Maps" amounts to asking the Commission to disregard the statute. Under the Territorial Assignment Act, SC Code § 58-27-640 (1976), the area "within 300 feet from the lines of all electric suppliers as such lines exist on the date of the assignments" constitutes a corridor through otherwise assigned territory, in which the customer has the right to choose suppliers. See, S.C. Code § 58-27-620(c) and (d).

S.C. Code § 58-27-620(1)(d)(iii) (1976) provides in part:

> (1) Every electric supplier shall have the right to serve:
>
> If chosen by the consumer, any premises initially requiring electric service after July 1, 1969, ...
>
> are located partially within three hundred feet of the lines of such electric supplier, as such lines exist on July 1, 1969, or as extended to serve consumers it has the right to serve or as acquired after that date, and partially within a service area assigned to another electric supplier pursuant to §58-27-640.

It is important to note that the statute does not state that corridors arise based upon lines as they appear on the "A Maps." Rather the statute specifically provides that corridors arise based on how "such lines exist on July 1, 1969. . . ." Thus, the issue before the Commission is not whether the Addie Graham line appeared on an "A-Map."

The issues are whether the Addie Graham line existed on July 1, 1969, and then whether the Walsh facility is within the 300-foot corridor emanating from that line, and then whether Walsh chose to receive service from Palmetto. SCE&G invites the Commission to disregard the statutory language to focus on whether a line appeared on a map, which the Commission declines to do. The principle of customer choice in corridors is well-established and controls here, as per the statute.

B. SCE&G Has Failed to Provide Persuasive Evidence That the Walsh Facility is Outside the Corridor Emanating From the Addie Graham Line.

SCE&G devoted considerable effort to establishing that a portion of the Addie Graham distribution line had been moved. Palmetto agrees that small portions of the distribution line have been moved over the years. However, the point at which Palmetto made the measurement to the Walsh facility has not moved since the line's inception in 1965. (Tr. p. 178, lines 24-25; p. 179, lines 1-3; p. 209, lines 12-14). Thus, there is no persuasive evidence that the Palmetto corridor does not exist as reflected on Exhibit 2 and as testified to by Palmetto.

C. The Fact That Palmetto Upgraded the Line From Single-Phase to Three-Phase Has No Legal Significance.

SCE&G also argues that Palmetto does not have corridor rights because it upgraded its line from single-phase to three-phase for purposes of serving Walsh. (The three-phase line runs along the same path as the previous single-phase line. Tr. p. 102, lines 6-8). We believe that the upgrading of the service in that manner does not destroy the original corridor right created under the Act. A contrary view is unacceptable, since, under SCE&G's theory, a provider having corridor rights would not have the right to

upgrade its lines to serve longstanding customers whose needs increase over the years, even if the customers were located wholly within the corridor. SCE&G would seem to argue that a provider upgrading its services would lose its corridor rights. This cannot be the case. If "changes" to a line robbed the line of its ability to maintain a corridor, all corridors would eventually disappear from existence, as some change is bound to occur sooner or later with 1969 lines.

D. There is No Authority to Support SCE&G's Argument That the "A-Map" Constitutes a Binding Contract.

SCE&G asserted that the "A Map" is a binding agreement between the parties. SCE&G provides no authority for this unique proposal. While the "A Map" was certainly an attempt to set out on paper all the lines in the particular area, it is clear that the parties were unsuccessful in this instance. SCE&G states no persuasive reason why such a document should be viewed as a binding contract. Further, the South Carolina Supreme Court does not favor an interpretation of documents in a manner that contradicts the Territorial Assignment Act. In Duke Power Company v. The Public Service Commission of South Carolina, et al., 343 S.C. 554, 541 S.E. 2d 250 (2001), the Court held that an interpretation of a Commission Order which would be in conflict with the Territorial Assignment Act was improper. Similarly, an interpretation of an "A Map" that would remove corridor rights acquired as the result of the Territorial Assignment Act is not valid. We find that the "A Map" is not a binding agreement or contract. (See also discussion in Section I.B. above.)

E. Even If the "A-Map" is Viewed as a Contract, South Carolina Law Provides for Reformation of Erroneous Contracts and Discourages Perpetuation of Mistakes in Contracts.

South Carolina law provides a mechanism for correcting mistaken or incorrect agreements in many areas. For example, errors in deeds are routinely corrected. Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981); Gowdy v. Kelley, 185 S.C. 415, 194 S.E. 156 (1937); Scates v. Henderson, 44 S.C. 548, 22 S.E. 724 (1895). "It has long been the law of this State that where a written contract does not conform to the intention of the parties, equity will reform the contract." Shaw v. Aetna Casualty & Surety Ins. Co., 274 S.C. 281, 285, 262 S.E.2d 903, 905 (1980). SCE&G contends that the purpose of the "A Map" was to depict all the lines in the area. If it failed to do so, then it must be corrected. George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 590, 545 S.E.2d 500, 508 (2001).

At the hearing SCE&G questioned whether the Palmetto line may have been left off the "A Map" by agreement or as part of some "customer swap." However, no evidence that this occurred was advanced, and suggestions to this effect amount to mere speculation. (Mr. Upshaw testified that it was "possible," but "highly unlikely," that Palmetto had agreed to leaving its line off the map and that it would never have agreed to "swap" Mrs. Graham with SCE&G.) (Tr. p. 106, lines 10-13; p. 148, lines 10-20; p. 152, line 25; p. 153, lines 1-14). Moreover, it was pointed out that had the parties swapped, Palmetto would not have been serving Addie Graham. (Tr. p. 148, lines 18-20). Clearly, the evidence before the Commission illustrates that the parties did not swap the corridor, since Palmetto has maintained and served off the distribution line since 1965.

South Carolina law also recognizes the principle of waiver. Waiver has been defined as the intentional relinquishment of a known right and may be implied from the circumstances. Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994); Steele v. Self Serve, Inc., 335 S.C. 323, 516 S.E.2d 674 (Ct. App. 1999). By its actions, SCE&G previously consented to Palmetto serving customers in the exact area that it now claims is SCE&G's exclusive assigned territory. While the Commission believes that SCE&G's Complaint must be denied for the other reasons set forth in this Order, SCE&G's case would still fail because by its conduct SCE&G waived any right to prevent Palmetto from providing service from the Addie Graham distribution line. See discussion, supra, at 7.

F. It Would be Contrary to Sound Public Policy to Allow an Erroneous "A-Map" to Deprive Customers of Their Statutory Right to Choose Suppliers Because of a Mistake.

It is clear from the record that the Addie Graham line was left off the "A Map" by mistake. Customers such as Walsh, and suppliers such as SCE&G and Palmetto, have a strong interest in the accuracy of "A Maps." It would be directly contrary to the public interest to allow decisions on service to be based upon incorrect maps. The aim is to make decisions based upon the facts presented to this Commission – not to perpetuate mistakes.

G. Motions to Strike

SCE&G has filed Motions to Strike certain portions of the testimony of Palmetto witnesses G. Thomas Upshaw and A. Berl Davis, Jr., based on the allegations that the testimony is cumulative, that it is presented by witnesses with no personal knowledge, and that the testimony is hearsay. We deny the Motions. The disputed testimony relates to

a conversation allegedly held between SCE&G witness Ackerman and Palmetto witness DuBose. SCE&G objects because of the witnesses' depiction of what was allegedly said by Mr. Ackerman.

Palmetto argued that the testimony is not hearsay, in that it goes to showing and establishing the mental state and present sense impressions of Upshaw and Davis at the time that they made a decision to pursue providing service to Walsh Fabrication. See South Carolina Rule of Evidence 803(3). Palmetto also argues that the testimony is not cumulative.

We agree with Palmetto that the testimony shows the mental state and present sense impressions of the two witnesses. We disagree with the argument that the evidence is cumulative. Finally, we disagree with the statement that the information is presented by witnesses with no personal knowledge. Obviously, both witnesses had knowledge of the conversation between Ackerman and DuBose. Accordingly, we deny the Motions to Strike. We will accept the testimony as part of the record in this case and give it whatever weight we determine to be appropriate.

CONCLUSION

After careful consideration of the entire record, the Commission rules that the service by Palmetto to the Walsh facility is permissible, that the Motions to Strike are denied, and that SCE&G's Complaint should be, and hereby is, denied and dismissed.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Mignon L. Clyburn
Chairman

ATTEST:

Bruce F. Duke
Deputy Executive Director

(SEAL)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2002-192-E - ORDER NO. 2003-731

DECEMBER 31, 2003

IN RE: South Carolina Electric & Gas Company,	)	ORDER DENYING
	)	PETITION FOR
Complainant,	)	RECONSIDERATION BY
	)	SOUTH CAROLINA
vs.	)	ELECTRIC & GAS
	)	
Palmetto Electric Cooperative, Inc.,	)	
	)	
Respondent.	)	

This matter comes before the Public Service Commission of South Carolina (the "Commission") on a Petition filed by South Carolina Electric & Gas Company ("SCE&G") for the Commission's reconsideration of Commission Order No. 2003-635. In Order No. 2003-635 the Commission dismissed SCE&G's Complaint filed in Docket 2002-192-E that Palmetto Electric Cooperative, Inc. ("Palmetto" or the "Coop.") was not entitled to provide service to an industrial electrical customer, referred to herein as "Walsh" or "the Walsh facility", and that Walsh was required to take service from SCE&G.

In its Petition for Reconsideration, SCE&G makes six arguments: (1) that the Commission erred in failing to find and conclude that Palmetto's service to the Walsh facility violates the Territorial Assignment Act; (2) that the Commission erred by failing to find and conclude that the "A" Sheets are the only reliable evidence of which electrical

service lines existed as of July 1, 1969; (3) that the Commission erred by not finding that Palmetto had constructed a new line on which Palmetto attempted to assert new corridor rights in SCE&G's assigned territory; (4) that the Commission erred in failing to find and conclude that Palmetto violated the provisions of S.C. Code of Regulations Sec. 103-304; (5) that the Commission erred by applying the law of reformation of contracts; and, (6) that the Commission erred by failing to find and conclude that, even if the law of reformation applies, the equitable Doctrine of Latches precludes Palmetto's claim.

As to the first four of these arguments, these issues were previously argued by the parties and addressed in Commission Order No. 2003-635, and we find that there is ample evidence contained in the record to support the Commission's findings and conclusions regarding these issues. There is nothing contained in the SCE&G Petition which convinces the Commission that there was any error of fact or law in the consideration of, and weight given, to the evidence of the pre-existing Palmetto service line (the "Addie Graham Line") or the SCE&G "A Map." Neither is there anything contained in SCE&G's arguments for reconsideration of these four issues which convinces the Commission that there was any error in its previous Order regarding these issues.

Further, the Commission finds that SCE&G's arguments contending that the Commission improperly applied the law of reformation of contract and that the equitable Doctrine of Latches precludes Palmetto's claim are groundless. As to the reformation of contract issue, the Commission finds that this argument is misplaced as we found in Order No. 2003-635 that the A Map did NOT form a contract. As there was never a

contract between the parties, there was no reformation of contract in the Commission's Order. Second, the issue of the Doctrine of Latches was never raised before this Commission in the prehearing pleadings or during the hearing on this matter. The legal argument on this point is therefore not a part of the record in this case and is therefore improperly raised for the first time by SCE&G in its Petition for Reconsideration. See, Watson v. Suggs, 313 S.C. 291, 437 S.E.2d 172 (Ct. App. 1993) (only matters raised in the pleadings may be considered upon the trial of the case); Indigo Associates v. Ryan Inc. Co., 314 S.C. 502, 431 S.E.2d 271 (1993) (one cannot present and try his case on one theory and then advocate another on appeal). However, even if the issue of Latches was properly before the Commission at this time, we would find that it is inapplicable. The Commission can find nothing in the record of this case to establish that Palmetto had any knowledge that the A Map in SCE&G's possession was in error or that there was any dispute between Palmetto and SCE&G regarding the territory at issue in this matter until the current dispute arose.

In conclusion, the Commission finds that the facts in the record in this case and the applicable statutes and regulations support the Commission's findings and conclusions. Specifically, the greater weight of the evidence in this matter shows that Palmetto's Addie Graham line, from which the 300-foot corridor was measured to provide service to the Walsh Facility, was in service prior to territorial assignment and that the SCE&G A Map was incorrect.

As noted in Order No. 2003-635, and contrary to SCE&G's alleged error, the "A" maps are not the only evidence in the record in this case regarding the service area in

question. Specifically, Palmetto presented at the hearing competent, reliable, and substantial evidence, which is a part of the record in this case, that the Walsh Facility is located within 300 feet of the Addie Graham Line and that this service line existed as of July 1, 1969. This evidence supports the Commission's factual findings and legal conclusions that Palmetto is properly servicing the Walsh Facility. Commission Order No. 2003-635, pgs. 5-6.

For these reasons, the Commission denies the Petition for Reconsideration and reaffirms its findings and conclusions as set forth in Commission Order No. 2003-635.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Mignon L. Clyburn, Chairman

ATTEST:

Bruce F. Duke, Deputy Executive Director

(SEAL)

EXHIBIT B

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-242-E - ORDER NO. 2002-357

MAY 3, 2002

IN RE: South Carolina Electric & Gas Company,	)	ORDER DENYING AND
	)	DISMISSING PETITION
Complainant/Petitioner,	)	
	)	
vs.	)	
	)	
Aiken Electric Cooperative, Inc.,	)	
	)	
Respondent/Defendant.	)	
	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition of South Carolina Electric & Gas Company (SCE&G or the Company) seeking an Order requiring Aiken Electric Cooperative, Inc. (Aiken or the Coop.) to cease and desist supplying electric service to Sandhills Elementary/Intermediate School on the grounds of an alleged violation of the Territorial Assignment Act (the Act), S.C. Code Ann. Section 58-27-610 et seq. (1976). This dispute concerns provision of electric service to certain premises near the town of Swansea in Lexington County, South Carolina. Aiken denies that it is in violation of the Act. Because of the reasoning stated below, we deny and dismiss the Petition.

A hearing was held on the matter on February 28, 2002 at 10:30 AM in the offices of the Commission, with the Honorable William Saunders, Chairman, presiding. SCE&G was represented by Francis P. Mood, Esquire and Catherine D. Taylor, Esquire. Aiken

was represented by Wilburn Brewer, Jr., Esquire and Richard S. Dukes, Jr., Esquire. The Commission Staff was represented by F. David Butler, General Counsel.

SCE&G presented the testimony of Clarence L. Wright. Aiken presented the testimony of Gary Stooksbury, Lawrence Baker, Franklin Vail, and Al Lassiter. The Commission Staff presented no witnesses in this case.

Cross-motions to strike the testimony of Clarence L. Wright and Al Lassiter were made by Aiken and SCE&G, respectively. We deny both motions. We will weigh the testimony of the two witnesses and give whatever weight we deem appropriate to the testimony of each witness.

The crux of the matter is that SCE&G maintains that the school is located in its assigned territory and that it has the exclusive right to serve pursuant to S.C. Code Ann. Section 58-27-620 et seq. (1976), the Territorial Assignment Act. Aiken claims that it has a right to serve the school by virtue of the fact that one of the school buildings, a maintenance building, is wholly within a 300-foot corridor of the Coop., and that it has the right to serve the entire tract as one premises pursuant to S.C. Code Ann. Section 58-27-620(1)(d)(iii) (1976). We agree with the position taken by the Coop.

The facts presented at the hearing are largely undisputed and the case turns on an interpretation of the relevant statutory law.

According to the testimony, prior to construction of the school in question, the School District received proposals for review from both SCE&G and Aiken. The School District had a plat laying out the construction and had located a maintenance building in the corridor of Aiken in the belief that this would give them a choice to be served by

either SCE&G or Aiken. Except for the maintenance building in the corridor, the school tract is within the assigned territory of SCE&G. The classroom school building is in SCE&G's assigned territory under the Territorial Assignment Act. After a final comparison, with the assistance of its engineering consulting firm, the School District chose to be served by Aiken. See Tr., Vail at 48-53.

The testimony further shows that the Coop. provides electricity to the maintenance building and to the classroom school building which are on the same tract of land, through one meter. Because of cost considerations and a study of engineering practices, the meter is located on the classroom building. After construction of the classroom building and the maintenance building, the school set up a temporary classroom building that was separately metered, but which is not separately billed, the billing being combined in one charge. The temporary building is in SCE&G's assigned territory. Tr., Stooksbury at 92-137.

In order to be able to serve the school, Aiken upgraded its line from single-phase to a three-phase line. This was accomplished largely by overlaying new lines over the location of the old lines and then removing the old lines. New poles were used except for the take-off pole from which the 300-foot corridor was measured. The corridor in question was established by lines of the Coop. that were in place prior to the Territorial Assignment Act and the corridor and lines are shown on the official maps of the Commission. See Hearing Exhibit 5. According to the testimony, service through these lines and the resulting corridor has been maintained by the Coop. for 52 years. Tr., Baker at 78.

The contention of SCE&G that all of the tract in question is within its assigned territory is incorrect. A part of the property is clearly with the Coop.'s corridor. See Hearing Exhibits 4 and 5. Under the Act, S.C. Code Section 58-27-640 (1976), the area "within 300 feet from the lines of all electric suppliers as such lines exist on the date of the assignments" are not included in the assigned territory, but are reserved as the supplying entity as a corridor. See S.C. Code Section 58-27-620 (c) and (d).

S.C. Code Ann. Section 58-27-620(1)(d)(iii)(1976) provides in part:

> (1) Every electric supplier shall have the right to serve:
> (d) If chosen by the consumer, any premises initially requiring electric service after July 1, 1969,...
> (iii) are located partially within three hundred feet of the lines of such electric supplier, as such lines exist on July 1, 1969, or as extended to serve consumers it has the right to serve or as acquired after that date, and partially within a service area assigned to another electric supplier pursuant to Section 58-27-640.

The above statute must be read in conjunction with the statutory definition of premises. S.C. Code Ann. Section 58-27-610(2)(1976) provides:

> The term "premises" means the building, structure or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for farming, business, commercial, industrial, institutional or governmental purposes, shall together constitute one "premises," except that any such building, structure or facility shall not, together with any other building, structure or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such services are calculated independently of charges for service to any other building, structure or facility.

These two statutes, read together, clearly authorize Aiken to serve the Sandhills School. By virtue of providing electricity to a building located wholly within its service area, i.e. the maintenance building, Aiken also would be entitled to serve other buildings on the same tract utilized by the same consumer, i.e. Sandhills School, where there only was one meter for the classroom building and the maintenance building, and additionally serving the temporary classroom building where, though separately metered, the billings were combined. Under these circumstances, the situation clearly was one of customer choice.

Contrary to the argument of SCE&G, there is no requirement under the statute that the metering point be located in the corridor through which the service rights are claimed. The statute in question, S.C. Code Ann. Section 58-27-610(2) only requires that "electricity is being or is to be furnished," leaving the parties free to design the system according to best engineering practice where multiple buildings are involved.

Further, even though the line creating the corridor rights has been upgraded from single-phase to three-phase, we believe that the upgrading of the service in that manner does not destroy the original corridor right created under the Act. A contrary view is unacceptable, since, under SCE&G's theory, a provider having corridor rights would not have the right to upgrade its lines to serve longstanding customers whose needs increased over the years even if the customers were located wholly within the corridor. SCE&G would seem to argue that a provider upgrading its services would lose its corridor rights or its right to serve "premises" under the statutory definitions. We reject that interpretation for the reason stated above.

Clearly, the language in the statute referring to the lines as they existed on July 1, 1969 is intended to fix the geographic location of the corridor as of that date, thereby protecting the investment made by the provider. SCE&G's witness confirmed the fact that there is no statute or regulation that states that you cannot upgrade a line as long as it is still in the corridor. Tr., Wright at 38. In the present case, the evidence shows that although the line was upgraded, it was overlaid over the old line so as to maintain the corridor's geographic location.

Accordingly, based on all of the above, the Commission rules that under the statutory definition of premises and the statutory provisions for customer choice, the situation in the case at bar was clearly a customer choice situation, and the customer chose the Coop. The service by Aiken is permissible as service to a "premises" as defined by the statute. Therefore, the Petition of SCE&G is denied and dismissed.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

William Saxon
Chairman

ATTEST:

Mary E. Walsh
Executive Director

(SEAL)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-242-E - ORDER NO. 2002-357

MAY 3, 2002

IN RE: South Carolina Electric & Gas Company,	)	ORDER DENYING AND
	)	DISMISSING PETITION
Complainant/Petitioner,	)	
	)	
vs.	)	
	)	
Aiken Electric Cooperative, Inc.,	)	
	)	
Respondent/Defendant.	)	
	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition of South Carolina Electric & Gas Company (SCE&G or the Company) seeking an Order requiring Aiken Electric Cooperative, Inc. (Aiken or the Coop.) to cease and desist supplying electric service to Sandhills Elementary/Intermediate School on the grounds of an alleged violation of the Territorial Assignment Act (the Act), S.C. Code Ann. Section 58-27-610 et seq. (1976). This dispute concerns provision of electric service to certain premises near the town of Swansea in Lexington County, South Carolina. Aiken denies that it is in violation of the Act. Because of the reasoning stated below, we deny and dismiss the Petition.

A hearing was held on the matter on February 28, 2002 at 10:30 AM in the offices of the Commission, with the Honorable William Saunders, Chairman, presiding. SCE&G was represented by Francis P. Mood, Esquire and Catherine D. Taylor, Esquire. Aiken

was represented by Wilburn Brewer, Jr., Esquire and Richard S. Dukes, Jr., Esquire. The Commission Staff was represented by F. David Butler, General Counsel.

SCE&G presented the testimony of Clarence L. Wright. Aiken presented the testimony of Gary Stooksbury, Lawrence Baker, Franklin Vail, and Al Lassiter. The Commission Staff presented no witnesses in this case.

Cross-motions to strike the testimony of Clarence L. Wright and Al Lassiter were made by Aiken and SCE&G, respectively. We deny both motions. We will weigh the testimony of the two witnesses and give whatever weight we deem appropriate to the testimony of each witness.

The crux of the matter is that SCE&G maintains that the school is located in its assigned territory and that it has the exclusive right to serve pursuant to S.C. Code Ann. Section 58-27-620 et seq. (1976), the Territorial Assignment Act. Aiken claims that it has a right to serve the school by virtue of the fact that one of the school buildings, a maintenance building, is wholly within a 300-foot corridor of the Coop., and that it has the right to serve the entire tract as one premises pursuant to S.C. Code Ann. Section 58-27-620(1)(d)(iii) (1976). We agree with the position taken by the Coop.

The facts presented at the hearing are largely undisputed and the case turns on an interpretation of the relevant statutory law.

According to the testimony, prior to construction of the school in question, the School District received proposals for review from both SCE&G and Aiken. The School District had a plat laying out the construction and had located a maintenance building in the corridor of Aiken in the belief that this would give them a choice to be served by

either SCE&G or Aiken. Except for the maintenance building in the corridor, the school tract is within the assigned territory of SCE&G. The classroom school building is in SCE&G's assigned territory under the Territorial Assignment Act. After a final comparison, with the assistance of its engineering consulting firm, the School District chose to be served by Aiken. See Tr., Vail at 48-53.

The testimony further shows that the Coop. provides electricity to the maintenance building and to the classroom school building which are on the same tract of land, through one meter. Because of cost considerations and a study of engineering practices, the meter is located on the classroom building. After construction of the classroom building and the maintenance building, the school set up a temporary classroom building that was separately metered, but which is not separately billed, the billing being combined in one charge. The temporary building is in SCE&G's assigned territory. Tr., Stooksbury at 92-137.

In order to be able to serve the school, Aiken upgraded its line from single-phase to a three-phase line. This was accomplished largely by overlaying new lines over the location of the old lines and then removing the old lines. New poles were used except for the take-off pole from which the 300-foot corridor was measured. The corridor in question was established by lines of the Coop. that were in place prior to the Territorial Assignment Act and the corridor and lines are shown on the official maps of the Commission. See Hearing Exhibit 5. According to the testimony, service through these lines and the resulting corridor has been maintained by the Coop. for 52 years. Tr., Baker at 78.

The contention of SCE&G that all of the tract in question is within its assigned territory is incorrect. A part of the property is clearly with the Coop.'s corridor. See Hearing Exhibits 4 and 5. Under the Act, S.C. Code Section 58-27-640 (1976), the area "within 300 feet from the lines of all electric suppliers as such lines exist on the date of the assignments" are not included in the assigned territory, but are reserved as the supplying entity as a corridor. See S.C. Code Section 58-27-620 (c) and (d).

S.C. Code Ann. Section 58-27-620(1)(d)(iii)(1976) provides in part:

> (1) Every electric supplier shall have the right to serve:
> (d) If chosen by the consumer, any premises initially requiring electric service after July 1, 1969,...
> (iii) are located partially within three hundred feet of the lines of such electric supplier, as such lines exist on July 1, 1969, or as extended to serve consumers it has the right to serve or as acquired after that date, and partially within a service area assigned to another electric supplier pursuant to Section 58-27-640.

The above statute must be read in conjunction with the statutory definition of premises. S.C. Code Ann. Section 58-27-610(2)(1976) provides:

> The term "premises" means the building, structure or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for farming, business, commercial, industrial, institutional or governmental purposes, shall together constitute one "premises," except that any such building, structure or facility shall not, together with any other building, structure or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such services are calculated independently of charges for service to any other building, structure or facility.

These two statutes, read together, clearly authorize Aiken to serve the Sandhills School. By virtue of providing electricity to a building located wholly within its service area, i.e. the maintenance building, Aiken also would be entitled to serve other buildings on the same tract utilized by the same consumer, i.e. Sandhills School, where there only was one meter for the classroom building and the maintenance building, and additionally serving the temporary classroom building where, though separately metered, the billings were combined. Under these circumstances, the situation clearly was one of customer choice.

Contrary to the argument of SCE&G, there is no requirement under the statute that the metering point be located in the corridor through which the service rights are claimed. The statute in question, S.C. Code Ann. Section 58-27-610(2) only requires that "electricity is being or is to be furnished," leaving the parties free to design the system according to best engineering practice where multiple buildings are involved.

Further, even though the line creating the corridor rights has been upgraded from single-phase to three-phase, we believe that the upgrading of the service in that manner does not destroy the original corridor right created under the Act. A contrary view is unacceptable, since, under SCE&G's theory, a provider having corridor rights would not have the right to upgrade its lines to serve longstanding customers whose needs increased over the years even if the customers were located wholly within the corridor. SCE&G would seem to argue that a provider upgrading its services would lose its corridor rights or its right to serve "premises" under the statutory definitions. We reject that interpretation for the reason stated above.

Clearly, the language in the statute referring to the lines as they existed on July 1, 1969 is intended to fix the geographic location of the corridor as of that date, thereby protecting the investment made by the provider. SCE&G's witness confirmed the fact that there is no statute or regulation that states that you cannot upgrade a line as long as it is still in the corridor. Tr., Wright at 38. In the present case, the evidence shows that although the line was upgraded, it was overlaid over the old line so as to maintain the corridor's geographic location.

Accordingly, based on all of the above, the Commission rules that under the statutory definition of premises and the statutory provisions for customer choice, the situation in the case at bar was clearly a customer choice situation, and the customer chose the Coop. The service by Aiken is permissible as service to a "premises" as defined by the statute. Therefore, the Petition of SCE&G is denied and dismissed.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

William Saunders
Chairman

ATTEST:

Mary E. Walsh
Executive Director

(SEAL)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-242-E - ORDER NO. 2002-423

JUNE 5, 2002

IN RE: South Carolina Electric & Gas Company,	)	ORDER DENYING
	)	PETITION FOR
Complainant/Petitioner,	)	RECONSIDERATION
	)	
vs.	)	
	)	
Aiken Electric Cooperative, Inc.,	)	
	)	
Respondent/Defendant.	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Reconsideration of our Order No. 2002-357 filed by South Carolina Electric & Gas Company (SCE&G or the Company) in this complaint matter against Aiken Electric Cooperative, Inc. (AEC or the Coop.) AEC filed a Response to the Petition. Because of the reasoning stated below, the Petition is denied and dismissed.

First, SCE&G states a belief that this Commission has somehow misconstrued or misapplied S.C. Code Ann. Sections 58-27-610, et seq (1976) and S. C. Code Regs. Section 103-304 (1976). SCE&G then urges us to adopt the statutory analysis found on pages 9-16 of its proposed Order in the case. We disagree that we have misconstrued or misapplied the Code sections, and, once again, as will be explained below, we reject the analysis as found on the designated pages of SCE&G's proposed Order. We also reject

the proposed principles that (a) S.C. Code Ann. Section 58-27-610 et. seq. requires that an electric supplier must directly serve a customer (i.e. deliver and meter power) within its corridor or assigned territory; and (b) that the changes in the essential character of the Coop.'s distribution line in the present case preclude the new line from constituting a basis for the continuation of corridor rights.

With regard to the contention that an electric supplier must directly serve a customer within its corridor or assigned territory, we reject said contention, and reaffirm our analysis as discussed in Order No. 2002-357. There is no such statutory directive. Under S.C. Code Ann. Section 58-27-610(2), the "premises" is the building, structure, or facility to which electricity is being or is to be furnished. The statute contains no requirement that the meter be located within the corridor.

The Company states that we were in error in concluding that separately metered buildings comport with the definition of a single premises in S.C. Code Ann. Section 58-27-610(2)(1976) because a consolidated bill for services was rendered. SCE&G states that the statute specifically provides that multiple buildings shall not constitute one premises if the electric service is separately metered and the charges for such service are calculated independently of charges to service to any other building structure or facility. We agree with this statement of the law. However, SCE&G goes on to state that whether or not one bill is rendered should not be a factor, since charges are calculated separately with separate meters, even though there is only one bill rendered. Again, we disagree.

In order to remove these facilities from the definition of "premises," SCE&G would have to show that electric service is not only separately metered, but that charges

for service are calculated independently of charges for service to any other building. This SCE&G cannot do. Witness Stooksbury testified that the Coop. provides electricity to the maintenance building and to the classroom school building which are on the same tract of land, through one meter. After construction of the classroom building and the maintenance building, the school in question set up a temporary classroom building that was separately metered, but which is not separately billed, the billing being combined in one charge. Tr., Stooksbury at 92-137. SCE&G failed to present any evidence that, even though separate meters existed, that the charges were calculated independently. Separate metering does not automatically equal independent calculation of bills. Indeed, the evidence showed that the charges were calculated and presented to the customer in one bill. Therefore, we conclude that the charges from the meters were not calculated independently, and all of the buildings on the site constituted one "premises." The Company's position that it is significant that a company's charges occurring in several different locations are often billed in separate bills, and that this means that "a single bill does not mean a single premises" is unavailing. In order to constitute a "premises," the facilities being served must be on the same or contiguous tracts of land. Widespread facilities' charges being consolidated into a single bill would not convert those properties into a single premises. In the present case, the facilities being served are on the same tract of land, and only one bill is rendered. Accordingly, the Coop. had the right to serve the entire "premises," i.e. the whole school. We discern no error.

Next, the Company urges us to hold that the changes in the essential character of the Coop.'s distribution line in the present case preclude the new line from constituting a

basis for the continuation of corridor rights. We reject this position as we did in Order No. 2002-357. We do not believe that upgrading the service from single-phase to three-phase destroys the original corridor right created under the Territorial Assignment Act. The language of the Act was clearly intended to fix the geographic location of the corridor as of July 1, 1969. However, we hold that the Act was not intended to fix permanently the type of line used to deliver electricity. Under SCE&G's theory, no electric service provider would ever be able to embrace technological improvements, repair damaged lines or upgrade its facilities to meet increased customer demand if that provider wanted to maintain its exclusive corridor. SCE&G's interpretation must be rejected, since it defies logic, and would lead to an absurd result. Clearly, the geographic location of the corridor as of July 1, 1969 must survive changes as a policy matter. If "changes" to a line robbed the line of its ability to maintain a corridor, all corridors would eventually disappear from existence, since some change is bound to occur sooner or later with 1969 lines. We do not believe that this was the intent of the Legislature. Accordingly, we reaffirm our position in the present case that, even though the original single phase line in the case at bar had been converted to a three-phase line, the original corridor as of July 1, 1969 still existed and, in fact, still exists. SCE&G's position is therefore rejected.

Lastly, SCE&G urges us to vacate our Order because our construction of the statute might lead to an "absurd" result. For illustrative purposes, SCE&G has attached to its Petition a map in which it attempts to show that our holding in this case would cause a substantial encroachment by the Coop. into SCE&G territory, and that this encroachment

would be virtually unrestricted. First, there is no evidence in the record to support the argument of the Company, or, for that matter, the map. Second, the Company would have the right to challenge such an incursion into its territory by the Coop. before this Commission, should an attempt actually be made to extend the corridor. The Company would have the right to argue before this Commission that such an extension would be improper, set bad policy or both, and the Commission could rule on the question. At the present time, however, such further extensions into SCE&G territory past the corridor are theoretical, thus, we do not have to consider them at this time. We therefore reject the last ground proffered by SCE&G.

Because of all of the reasoning, as stated above, the Petition for Reconsideration is denied and dismissed. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE CIRCUIT COURT**
South Carolina Electric & Gas, Co., Petitioner, vs. Aiken Electric Cooperative, Inc., Respondent.	Case No. 02-CP-40-3380 **ORDER**

This matter is before the Court upon Petitioner South Carolina Electric and Gas, Co.'s ("SCE&G") appeal of the Public Service Commission's ("Commission") Order affirming Lexington County School District Four's ("Lexington Four") choice of Aiken Electric Cooperative, Inc. ("AEC") to provide electric service to the Sandhills School in Swansea, South Carolina. All parties appeared by counsel of record and argued this appeal on November 6, 2003 in Richland County. AEC presented a brief of authorities with record excerpts at the hearing. At the conclusion of the hearing, the Court instructed both parties to submit briefs and/or proposed orders for the Court's consideration.

After careful consideration of the arguments and materials presented by the parties, the Court affirms the PSC's Order affirming Lexington Four's choice of AEC to provide electric service to the Sandhills School in Swansea, South Carolina for the reasons set forth below.

FACTUAL BACKGROUND

The Sandhills School consists of two buildings, a classroom building and a maintenance facility, both of which are situated on the same tract of property. The maintenance building lies entirely within AEC's exclusive corridor extending three hundred feet from an AEC distribution

line that existed prior to July 1, 1969 (Deposition of Gary Stooksbury, pp. 25-26; Pre-filed testimony of Stooksbury, Tr. p. 105 ll. 7-25; p. 106 ll. 1-8; p. 107 ll. 1-7). The classroom building is located in SCE&G's assigned territory (Pre-filed testimony of Stooksbury, Tr. p. 96, l. 3-20).

The plat that has been attached as Exhibits 1 and 2 to Gary Stooksbury's prefiled testimony, copies of which are attached to Respondent AEC's Memorandum in Support of the PSC's Order as ***Exhibit 1*** illustrating the layout of the property as described herein. Lexington Four, therefore, had the right to choose an electric supplier for the school pursuant to S.C. Code Ann. §58-27-620(1)(d)(iii), which provides in pertinent part that, an electric service provider may supply electricity if chosen by the customer where the premises to be served is:

> partially within three hundred feet of the lines of such electric supplier, as such lines exist on July 1, 1969, or as extended to serve consumers it has the right to serve or as acquired after that date, and partially within a service area assigned to another electric supplier pursuant to §58-27-640. . . .

S.C. Code Ann. §58-27-620(1)(d)(iii).

Lexington Four received proposals from both SCE&G and AEC (Deposition of Dr. J. Franklin Vail, p. 6; Pre-filed testimony of Dr. Vail, Tr. p. 50 ll. 5-19). Initially, the two proposals were not comparable and the School Board was unable to determine which was the best proposal (Deposition of Dr.Vail, p. 8-9, Pre-filed testimony of Dr. Vail, p. 50 ll. 20-22; p. 51 ll. 1-22: p. 52 ll. 1-18). AEC submitted a revised proposal so that the School Board could make a determination (Deposition of Stooksbury, pp. 20-21; Pre-filed testimony of Stooksbury, Tr. p. 98 ll. 11-22; p. 99 ll. 1-20). After reviewing the two comparable proposals, it was clear that AEC's proposal was superior and would result in a considerable savings for the taxpayers of Lexington County (Deposition of Dr. Vail, p.9, Pre-filed testimony of Dr. Vail, Tr. p. 52 ll. 13-

20). The Board unanimously voted to choose AEC to serve the school (Deposition of Dr. Vail, pp. 15-16; Pre-filed testimony of Dr. Vail, Tr. p. 52 ll. 17-18).

PROCEDURAL BACKGROUND

On May 15, 2000, SCE&G filed a Complaint before the Public Service Commission ("Commission") concerning AEC's electrical service to the Sandhills School. On February 28, 2002, this matter was carefully considered in its entirety before a full panel of the Commission. On May 3, 2002, after thoroughly reviewing the facts and carefully considering live testimony, the Commission upheld Lexington Four's choice of AEC to provide electric service to the Sandhills School in Swansea, South Carolina. (Commission Order No. 2002-357 dismissing SCE&G's complaint). SCE&G applied to the Commission for reconsideration, which was denied. (Commission Order No. 2002-423 denying SCE&G's petition for reconsideration attached to Respondent AEC's Memorandum in Support of the PSC's Order as ***Exhibit 2***).

Appellant SCE&G now claims that the Commission's Order is unlawful, in that: (1) the Commission's order misconstrues S.C. Code Ann. §58-27-610; (2) that the Order misconstrues S.C. Code Ann. 58-27-620(1)(d)(iii); (3) that AEC should not be able to upgrade its distribution line; and (4) that the Order violates S.C. Code Regs. §26-103-304.

STANDARD OF REVIEW

This Court employs a deferential standard of review when reviewing a decision of the Commission and will affirm that decision when substantial evidence supports it. Duke Power Co. v. Public Service Com'n of South Carolina, 343 S.C. 554, 541 S.E.2d 250, S.C., (2001); Porter v. South Carolina Public Service Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998). Moreover, the Court may not substitute its judgment for the Commission's on questions about which there is room for a difference of intelligent opinion. Id.; see also, Heater of Seabrook, Inc.

v. Public Serv. Comm'n of South Carolina, 324 S.C. 56, 478 S.E.2d 826 (1996). Where an agency is charged with the execution of a statute, the agency's interpretation of the statute should not be overruled by a court without a cogent reason. See, Nucor Steel v. South Carolina Public Service Comm'n, 310 S.C. 539, 426 S.E.2d 319 (1992).

Because the Commission's findings are presumptively correct, the party challenging a Commission order bears the burden of convincingly proving the decision is "clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." Id. at 60, 478 S.E.2d at 828 (*quoting* Patton v. South Carolina Pub. Serv. Comm'n, 280 S.C. 288, 290-91, 312 S.E.2d 257, 259 (1984)); S.C.Code Ann. §1-23-380(A)(6) (Supp.1999).

ANALYSIS

The Public Service Commission's Order upholding Lexington Four's choice of AEC to provide electric service to the Sandhills School in Swansea, South Carolina is not clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. Thus, SCE&G has not met its appellate burden. Accordingly, the Commission's Order is affirmed for the following reasons:

1. **The classroom building and maintenance facility should be treated as one "premises" as provided in S.C. Code Ann. §58-27-610(2).**

The term "premises" is defined in S.C. Code Ann. §58-27-610(2) as:

> the building, structure, or facility to which electricity is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric customer for farming, business, commercial, industrial, institutional, or governmental purposes, shall together, constitute one 'premises,' except that any such building, structure or facility shall not, together with any other building, structure or facility, constitute one 'premises' if the electric service to it is separately metered **and** the charges for such service are calculated independently of charges for service to any other building, structure or facility.

S.C. Code Ann.§58-27-610(2) (emphasis added).

In the present case, the Commission properly concluded that the buildings and facilities making up the Sandhill's school should be treated as a single premises for the purposes of §58-27-610(2). Though the terms "buildings, structures, or facilities" as used in Section 58-27-610(b) are not defined by the statute, one of the primary rules in statutory construction is that the words used in a statute should be given their plain and ordinary meaning without resorting to forced construction to limit or expand the statute's operation. First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 417 S.E.2d 592 (1992); see also Stevenson v. Board of Adjustment, 230 S.C. 440, 96 S.E.2d 456, 462 (1957) (words used in a statute should be taken in their ordinary and popular signification) *quoting* Wragge v. South Carolina & G. Railroad Co., 47 S.C. 105, 25 S.E. 76 (1896). Where a statute uses a term that has a well-recognized meaning in the law, there must be a presumption that the General Assembly intended to use the term in that same sense. Id.; see also, Coakley v. Tidewater Constr. Corp., 194 S.C. 284, 9 S.E.2d 724 (1940). Moreover, an undefined term should be construed in the context of the other terms used within the statute as a whole, rather than as an isolated phrase being construed. See Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354, S.C. 18, 23-24, 579 S.E.2d 334, 337 (Ct. App. 2003).

Black's Law Dictionary defines "building" as a "[s]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof." Black's Law Dictionary 194-95 (6th ed. 1990). American Jurisprudence defines the term "building" in the usual and ordinary sense of the word as a structure designed and suitable for the habitation or sheltering of human beings and animals, sheltering or storing property, or for use

and occupation for a trade or manufacture. 13 Am. Jur. 2d Buildings § 1 (1964) (emphasis added). Citing Webster's Dictionary, the South Carolina Supreme Court has defined "building" as "a fabric framed or designed to stand more or less permanently." Brown v. Sikes, 188 S.C. 288, 198 S.E. 854, 856 (1938).

The maintenance facility and classroom building are both designed to stand more or less permanently and are suitable for sheltering people and property (Deposition of Stooksbury, pp. 33-36; Tr. p. 44 ll. 1-4). Both buildings are situated on the same tract of property. Id. Both are used by one electric customer (Lexington School District Four) for an institutional, or governmental purpose. (Tr. p. 96 ll. 3-14). The permanent buildings receive electric service from a single metering point and the charges for such service will not be billed separately (Deposition of Stooksbury, pp. 33-36). The maintenance building and classroom building must be treated as a single premises under the statutory definition and, because part of the premises is in AEC's exclusive corridor, pursuant to S.C. Code Ann. §58-27-620(1)(d)(iii), Lexington Four was entitled to choose either AEC or SCE&G as an electric service provider for the premises. Even though SCE&G raises issues concerning the procurement of electrical services by the school district from AEC and the school district's efforts to legitimize its choice of AEC as its electrical provider, no exact violation of the procurement process is stated.

At the November 6th appellate hearing, SCE&G contended that the Sandhills School should not be considered a premises since a temporary modular building used a temporary convenience meter in the past. The Court, however, does not find this argument persuasive. In order to remove these facilities from the definition of "premises," SCE&G would have to show that electric service is not only separately metered, but also that the charges for service are calculated independently of charges for service to any other building. (See S.C. Code Ann. §58-

27-610(2)) (not considered a premises if separately metered and separately billed.) Here, where a statute uses a term that has a well recognized meaning, (i.e. "and") - the presumption is that the General Assembly intended to use that term as ordinarily defined. See State v. Bridgers, 495 S.E.2d 196, 329 S.C. 11 (1997). Thus, SCE&G must show both, that electricity was separately metered and that it was separately billed. This SCE&G cannot do. See ***Exhibit 2***, Commission Order denying petition for reconsideration. In any event, the temporary meter was only used during construction.

At trial, Witness Stooksbury testified that AEC briefly provided electricity to a temporary portable building that was separately metered but not separately billed, the billing being combined in one charge (Tr. p.110 ll.18-25, p.111 ll. 1-6, 14-20). SCE&G failed to present any evidence that the charges were calculated independently (Tr. p.166 ll. 1-25 p 167 ll. 1-4). Separate metering does not automatically equal independent calculation of bills. Id.; See also, S.C. Code Ann. §58-27-610(2). Here the calculations were calculated and presented to the Sandhills School on one bill. Id. Therefore, the charges from the temporary meter and the fixed meter were not calculated independently, and all of the buildings on the site constitute one premises. Id. Accordingly, the Commission was correct in concluding that AEC had the right to serve the entire premises, i.e. the whole school.

2. Lexington Four's right to choose an electric supplier pursuant to S.C. Code Ann. §58-27-620(1)(d)(iii) is supported by the Commission's Order in Carolina Power & Light Co. v. Pee Dee Electric Cooperative, Inc.

SCE&G also argues in its appellate petition that "[e]lectricity must be delivered by the utility to the customer, i.e. metered, within the service area or corridor of the utility claiming the right to serve." (SCE&G Petition for Judicial Review, p. 3.) However, despite this assertion, at trial and on appeal SCE&G is unable to point to any statute or regulation that requires that the

meter be attached directly to a building within the corridor in order to serve the entire premises (see Tr. p. 40 ll. 4-8).

On the other hand, the Commission's Order affirming Lexington Four's right to choose is supported by S.C. Code Ann. §58-27-620(1)(d)(iii) and the Commission's own precedent. In a similar case, both its Order and its Order on Rehearing, Carolina Power & Light Co. v. Pee Dee Electric Cooperative, Inc., Docket No. 97-301E, Order Nos. 98-450 and 98-867, the Commission determined that Hartsville H.M.A. had the right to choose an electric service provider for Byerly Hospital where only a small portion of one building, a portico or awning of another, and a portion of a planned office building, lay partially in Pee Dee's corridor, partially within CP&L's assigned territory, and partially in unassigned territory (attached to Respondent AEC's Memorandum in Support of the PSC's Order as ***Exhibit 3***, see pp. 5-9; Order on Rehearing attached as ***Exhibit 4***, see pp. 12-16). Additionally, the separate buildings making up the hospital complex were to be metered separately, though the hospital was only to receive one bill.

As the Commission recognized in both its Order and its Order on Rehearing, under South Carolina law, the term "premises" means "the building, structure, or facility to which electricity is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric customer for farming, business, commercial, industrial, institutional, or governmental purposes, shall together, constitute one premises . . . ." S.C. Code Ann. §58-27-610(2), *quoted in* CP&L v. Pee Dee Electric Cooperative, Order No. 98-867 at 14. Based upon this statute and what the Commission recognized was its broad view of what constitutes a premises, the Commission held that "the main hospital with the portico, the medical building with the covered driveway, and the energy building fall under S.C. Code Ann. Section 58-27-620(1)(d)(iii) which states that such premises

have a customer choice for an electric supplier which 'are located partially within a service area assigned to such electric supplier . . . and partially within three hundred feet of the lines of another electric supplier . . . .'" CP&L v. Pee Dee Electric Cooperative, Order No. 98-867 at 15, quoting S.C. Code Ann. §58-27-60(1)(d)(iii).

There is no reason for this Court to overrule established Commission precedent. As with Byerly Hospital, the Sandhills School consists of multiple buildings that should be treated as one premises, pursuant to §58-27-610(2), for the purposes of determining whether the customer has the right to choose as provided in §58-27-60(1)(d)(iii).

SCE&G urges the Court to consider new evidence in the form of exhibits that were attached to SCE&G's motion to reconsider. The Court has not considered these exhibits and specifically rejects any attempt to add to the record before the Commission. A party may not use a petition to reconsider to present new evidence, tender new theories, or raise arguments that could have been offered or raised prior to judgment. Anderson Memorial Hospital, Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399 (Ct.App. 1994)("A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not").

3. The Fact That AEC Upgraded the Line From Single-Phase to Three-Phase Has No Legal Significance.

SCE&G, through its trial witness, Clarence Wright, contends that AEC lost its corridor rights when the cooperative upgraded its pre-existing line. This argument completely misconstrues the statutes and represents an absurd statutory construction. Under SCE&G's interpretation, any time a company replaces a power line, whether to upgrade its services, to conduct appropriate maintenance, or to replace lines damaged by falling trees, automobile accidents, or any other event, then the company would lose its corridor rights.

Such an argument was implicitly rejected by the Commission in the Hartsville HMA case. There, Pee Dee Electric Cooperative had had a line and two poles on the tract where the hospital was to be built. At some point, the Cooperative disconnected service to a tenant house for nonpayment. The house later burned down. There was testimony that the line itself may have been taken down and later replaced. Nevertheless, the Commission determined that Pee Dee continued to possess a corridor across the tract (Order, pp. 5-7; Order on Rehearing, pp. 12-15).

AEC had a pre-existing line by which it served the New Life Church. This line existed on July 1, 1969, and, pursuant to S.C. Code Ann. §58-27-620, AEC continues to have a corridor extending 300 feet from that line. SCE&G's construction tortures the meaning of the statute, for, if taken to its logical conclusion, an electric power supplier would only have corridor rights to the extent the actual lines that existed on July 1, 1969, remained. No supplier would be able to upgrade its facilities, nor would it be permitted to enhance the safety of its lines, nor could a supplier replace damaged lines. The language in the statute referring to the lines as they existed on July 1, 1969, obviously is intended to fix the geographic location of the corridor as of that date, thereby protecting the investment made by the provider. It is not intended to limit the configuration or properties of the line, but only its location. This is the only logical construction of the statute, and a construction with which SCE&G's witness agreed. See Tr. p. 37 ll. 14-25, p. 38 ll. 1-13. Here, the evidence is that although the line was upgraded, it was overlaid over the old line so as to maintain the corridor's geographic location. Thus, there is no legal foundation for SCE&G's suggested construction of §58-27-620.

SCE&G's additional argument, that AEC had no right to serve the premises because the buildings had yet to be construed, is likewise untenable. The position is in direct opposition to the clear language of §58-27-610(2) which states that a "premises" is:

> the building, structure, or facility to which electricity is being or is to be furnished . . . .

S.C. Code Ann. §58-27-610(2)(emphasis added). Clearly the statute contemplates both existing and planned structures.

The Hartsville HMA case is instructive. None of the structures which were to make up the Byerly Hospital facility had been constructed at the time CP&L and Pee Dee Electric Cooperative began the litigation. In fact, one building was not scheduled to be constructed for several years (Order on Rehearing, p. 13). Yet, notwithstanding the fact that none of the buildings existed, this Commission determined that the customer had the right to choose a supplier for planned facilities where the premises was partially in CP&L's assigned territory, partially within Pee Dee's corridor, and partially in unassigned territory.

SCE&G's position is, therefore, unsupported and unsupportable. Lexington District Four had the right to choose an electric service provider for the planned Sandhills School. Any other construction of the statutes is nonsensical. For example, under SCE&G's position, in customer choice situations, the customer would have no right to choose a supplier until after the premises is complete. No customer could perform any reasonable economic analysis or forecasting in order to determine what the long-term costs of the premises would be and how much income would need to be earned in order for the facility to be profitable.

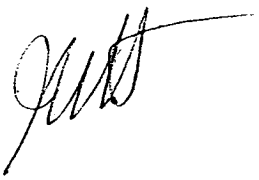
SCE&G cites Payne v. Duke Power, 304 S.C. 447, 405 S.E.2d 399 (1991) for the proposition that a line upgrade destroys a corridor right as a line upgrade is a change in the "character" of the line. However, as SCE&G candidly points out, unlike the current matter at bar, the Payne case did not involve a territorial dispute but rather a class action contractual utility rate dispute (Trial Tr. p. 15 ll.11-12). Further review of the Payne case reveals that the Court's reasoning in Payne was limited to a contractual interpretation of the purchase agreement

whereby a private utility, Duke Power, purchased a county power system. Specifically, the Payne case dealt with an interpretation of the purchase agreement to determine when county customers rates would be increased to higher private utility rates. Accordingly, this Court does not find the Payne case useful precedent, as it did not involve statutory service rights, but rather involved a class action contractual rate dispute and an interpretation of a purchase agreement.

4. S.C. Code Regs. §26-103-304 is Not Applicable to This Matter.

SCE&G contends that AEC does not have the right to serve the Sandhills School because Palmetto did not obtain prior approval from the Commission. SCE&G contends that such prior approval is required by S.C. Reg. 103-304. This is not a persuasive argument.

The right to provide service in a corridor is a right provided by statute. S.C. Code Ann. §§58-27-620, 58-27-640. AEC's rights to this service do not arise form any assigned or other act of the commission. The statutory scheme under which AEC was entitled to serve the Sandhills School does not require prior approval from the Commission. It is well-established law that a regulation may not materially add to, or impose a burden upon, a right vested by statute. Nor may a regulation be applied in a manner that would undermine or contravene the intent of the Legislature as expressed in a statutory enactment. A regulation is legal and valid only to the extent that it gives effect to a statute; not where it adds requirements on top of the statute. Heyward v. S.C. Tax Comm., 240 S.C. 347, 126 S.E.2d 15, 19-20 (1962); Young v. S.C. Dept. of Highways and Pub. Trans., 287 S.C. 108, 336 S.E.2d 879 (Ct. App. 1985); S.C. Code Ann. §1-23-380(g)(1); Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948); U.S. Outdoor Adv. v. SCDT, 324 S.C. 1, 481 S.E.2d 112 (1997).



Applying these principles, the Court cannot conclude that AEC's statutory right to serve can be inhibited or conditioned upon prior regulatory approval – the statutory scheme simply makes no provision for such an arrangement.

Furthermore, such argument is not ripe as F. David Butler, attorney for the Commission, pointed out at the appellate hearing. Regulation 103-304 is a matter currently under consideration by the Commission and the Commission has not ruled on this issue (Appeal Tr. p.31 ll.18-25, p.32 ll. 1-16). SCE&G is correct that the Commission may "fill in the details" in carrying out Reg. 103-304. (SCE&G Brief, p. 18). Here, as Mr. Butler stated at the hearing, the Commission has interpreted Reg. 103-304 to not apply to this matter as AEC has a statutory right to serve the School via the AEC corridor. (Appeal Tr. p.31 ll.18-25, p.32 ll. 1-16). Thus, the Commission has filled in the blanks of Reg. 103-304 by finding that it is inapplicable to this matter.

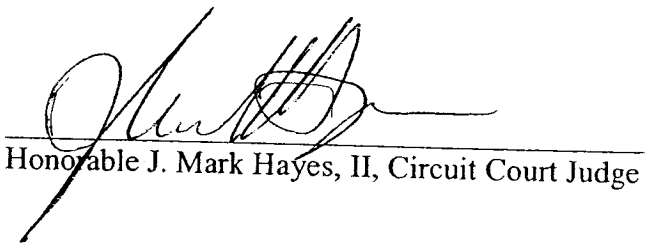
CONCLUSION

Pursuant to South Carolina statute, where part of a premises lies within one electric service provider's exclusive corridor and partially within another provider's assigned territory, the customer has the right to choose. Where two or more buildings, structures, or facilities are located on the same tract of property and are used by the same customer for business, commercial, or governmental purposes, then the several buildings are to be treated as a single premises. The Sandhills School is such a premises and Lexington School District Four was entitled to choose AEC as the electric service provider for the Sandhills School.

After careful consideration of the matters properly preserved for appeal, this Court affirms the Public Service Commission's Order upholding Lexington Four's choice of AEC to

provide electric service to the Sandhills School in Swansea, South Carolina. SCE&G's appeal is hereby dismissed.

IT IS SO ORDERED.



Honorable J. Mark Hayes, II, Circuit Court Judge

Columbia, South Carolina

December 22, 2003.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-180-E, 2003-254-E

IN RE:

South Carolina Electric & Gas Company Complainant/Petitioner vs Aiken Electric Cooperative, Inc. Defendant/Respondent	)	**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **Answer And Counterclaim** has been served upon counsel of record by hand-delivering a copy of the same on the 18th day of July, 2005, to the addresses shown below.

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